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91-1477

No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1991

K. E. NORTH,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

WILLIAM O. ISENHOUR, JR.
(Counsel of Record)
and
JOHN M. COX of
SODEN & ISENHOUR, P.A.
6005 Martway, Suite 108
Mission, Kansas 66202-3376
(913) 384-4800
Counsel for Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

1. Does the affirmative misconduct of the Internal Revenue Service preclude recovery of 26 U.S.C. Sec. 6672 penalties from Petitioner?

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UNITED STATES OF AMERICA,

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Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

To The Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner K. E. North respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit entered in these proceedings on December 13, 1991 affirming the memorandum and order of the United States District Court of the District of Kansas filed July 11, 1990 and judgment filed January 17, 1991.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit is unpublished and is printed in Appendix A hereto, *infra*, page App. 1. The Memorandum and Order of the United States District Court for the District of Kansas is printed in Appendix B hereto, *infra*, page App. 7. The Order of the United States District Court for the District of Kansas denying petitioner's motion for reconsideration is printed in Appendix C hereto, *infra*, page App. 17. The Judgment of the United States District Court for the District of Kansas is printed in Appendix D hereto, *infra*, page App. 18.

JURISDICTION

The judgment of the United States Court of Appeals for the Tenth Circuit (Appendix A, *infra*, page App. 1) was entered on December 13, 1991. This Court's jurisdiction is invoked under 28 U.S.C. Sec. 1254(1).

STATUTORY PROVISIONS INVOLVED

The statute involved in this case is 26 U.S.C. Sec. 6672(a):

> Sec. 6672. Failure to collect and pay over tax, or attempt to evade or defeat tax
>
> (a) General rule. – Any person required to collect, truthfully account for, and pay over any tax imposed by this title who willfully fails to collect such tax, or truthfully account for and

> pay over such tax, or willfully attempts in any manner to evade or defeat any such tax or the payment thereof, shall, in addition to other penalties provided by law, be liable to a penalty equal to the total amount of the tax evaded, or not collected, or not accounted for and paid over. No penalty shall be imposed under section 6653 for any offense to which this section is applicable.

STATEMENT OF THE CASE

Petitioner brought suit against the United States to obtain a refund of partial payment of a "100% penalty" assessed against him pursuant to 26 U.S.C. Sec. 6672 as a "responsible person" for Sequal, Inc. which had failed to remit federal employment taxes withheld from employees' wages during 1982 - 1984. Respondent counterclaimed for the penalty together with statutory additions from the date of assessment. Originally, Respondent sought to assess other penalties against Petitioner for tax quarters in 1981 but was unsuccessful. Respondent then made an assessment against Petitioner on March 2, 1987 in the amount of $117,868.25 for the 1982 to 1984 taxes.

Petitioner did not dispute that he was a "responsible person". Petitioner also did not dispute the amount of taxes owed except for one quarter. His defenses to the counterclaim were based on governmental misconduct barring its claim and constitutional infirmities of denial of equal protection and due process. The primary issue presented was whether Petitioner "willfully" failed to pay over the federal employment taxes due from Sequal,

Inc. or whether Respondent's misconduct precluded it from recovering from Petitioner.

Petitioner and the IRS reached agreement that Sequal should continue in business until a purchaser could be found to buy the business as a going concern. Petitioner further agreed to close down the corporation at such time as the IRS decided that was appropriate. He regularly kept IRS agents informed of his attempts to sell the business.

On December 31, 1984, Sequal's stock was sold to James C. Williams who continued to operate the corporation. After the sale, Sequal made payments to the IRS of $10.00 to $50.00 per week towards the delinquent taxes pursuant to an agreement between Sequal and the IRS. Under that agreement, the IRS collected a total of $2,460.00 from Sequal between March 11, 1985 and August 4, 1986. Nothing has been collected since.

In 1983, MidAmerican Bank filed suit in state court to foreclose its security interest in Sequal's real and personal property. The IRS was a named defendant and participated in that suit. Petitioner was not a party to the action. The state court's judgment of foreclosure was entered on June 25, 1984. However, a foreclosure sale of Sequal's assets was not held until June 28, 1989. By that time, the Bank's judgment against Sequal had increased with interest from $377,104.71 to $536,208.36. The IRS agent apparently mistakenly believed that all of Sequal's assets were encumbered by the bank's liens. The foreclosure judgment specifically stated, however, that except for some equipment and accounts receivable, the IRS tax liens against Sequal had a first priority on all of Sequal's

personal property. That language was included at the specific request of the Assistant U.S. Attorney representing the IRS.

The Bank ultimately purchased the real estate foreclosed upon at Sheriff's sale for $150,000.00, (even though the property had a value of $350,000.00 about the time the foreclosure judgment was entered), leaving a deficiency judgment against Sequal after the sale of $386,208.36. Despite having notice of the sale price, confirmation hearing and the Order of Confirmation, the IRS took no action to insure that an adequate price was received for the real estate. Petitioner (who was not a party to the foreclosure action) did not receive notice of the sale price or confirmation until after the present action had already commenced, seven months after the sale.

Apparently, no foreclosure sale was ever held for Sequal's personal property. Sequal owned personal property in 1984 (other than equipment and accounts receivable pledged to the Bank) having a value of at least $409,165.00. The IRS had actual, specific knowledge of the nature, extent and value of these assets at that time. Sequal could have paid the delinquent taxes or the IRS could have collected from these assets.

Williams, with the full knowledge of the IRS, incorporated "Sequal Manufacturing, Incorporated" ("New Sequal") in May, 1986. New Sequal hired the employees of Sequal and, for a time, leased its assets. In December, 1988, New Sequal purchased from the Bank all of the Sequal personal property assets including the assets in which the IRS had a priority interest. None of the proceeds of this sale were paid to the IRS. IRS records

produced in discovery reflect that as early as November 22, 1985, the IRS considered Sequal to be defunct and insolvent.

The IRS agent at the time of the formation of New Sequal was aware the assets were being transferred to the new corporation, but told Sequal it could just quit paying on the delinquent taxes "and we would see what happened".

The agent's file which contained all of his notes and records of his handling of this matter could not be located by the IRS and was apparently destroyed in March of 1988.

After completion of discovery, Respondent moved for summary judgment. The District Judge ruled generally in favor of Respondent on both the complaint and counterclaim finding a genuine dispute existed only as to the amount of the IRS claim. Petitioner's motion for reconsideration was denied and the parties eventually stipulated to the amount due. The District Judge entered judgment for Respondent in the amount of $106,719.78 plus interest and costs. Appeal to the United States Court of Appeals for the Tenth Circuit followed. That Court affirmed the District Court's decision on December 13, 1991.

BASIS FOR FEDERAL JURISDICTION

Jurisdiction of this case in the United States District Court for the District of Kansas was based upon 28 U.S.C. Sec. 1346(a)(1) and 62 U.S.C. Sec. 7422 (a).

REASONS FOR GRANTING THE WRIT

This case is about intentional, affirmative misconduct by the IRS and whether or not that misconduct should bar the IRS from assessing responsible person liability against Petitioner under 26 U.S.C. Sec. 6672.

Petitioner had an agreement with the IRS that the business would keep operating so it could be sold as a going concern to pay the taxes. Petitioner performed his part: kept Sequal in business, found a buyer and sold the company. Respondent did not keep its end of the deal. It ignored Sequal's assets, told the new owner to quit paying the taxes and then affirmatively helped Sequal's new owner to fraudulently convey the corporate assets to a new corporation to shelter them from tax liability.

In granting and upholding Respondent's motion for summary judgment, both the District Court and Court of Appeals characterized Petitioner's position as being that he should be excused from payment of the penalties because the IRS failed to collect the taxes from the corporation taxpayer first. This is not correct. Petitioner's argument is that Respondent's affirmative misconduct in actively assisting Sequal's new owner in fraudulently conveying the corporation assets to escape tax liability is so fundamentally unfair and repugnant that the IRS

should be barred by its own conduct from imposing penalties on Petitioner. This was no mere failure to act on the part of the IRS. It was an intentional, conscious course of action done after Respondent had led Petitioner from a point where he had no personal responsibility for any of Sequal's taxes to direct liability under Section 6672. The District Court and Court of Appeals' failure to recognize this point is an important question of federal law which to Petitioner's knowledge has never been decided by this Court.

Respondent's position throughout this litigation has been that this is a "typical" taxpayer case in which the government is just doing its job collecting the taxes the best it can and that the taxpayer is trying to avoid them by asserting arguments which have long been rejected by the courts. However, the undisputed facts of this case are anything but "typical":

1. Respondent tried and failed to assess responsible person liability against Petitioner in 1981.

2. Failing to do so, Respondent then agreed to and actively participated in Petitioner's plan to operate Sequal to sell it as a going concern. During this period, the IRS had actual knowledge that taxes were not being paid and other creditors were being preferred. It not only said and did nothing, but continued encouraging operation of the business thereby deliberately allowing Petitioner to accrue substantial and potentially personal tax liabilities.

3. When the plan to sell the business as a going concern succeeded, the IRS collected little or no taxes from the corporation which continued to be liable and

then actively assisted the new owner in reincorporating the business to absolve it from any tax liability.

4. The IRS knowingly failed to assert any claims against Sequal's assets *even after* it successfully asserted its priority over other creditors in the state court proceedings, instead allowing proceeds to be paid over to creditors junior to it.

5. After all this had happened, Respondent elected to pursue Petitioner for the full amount of delinquent taxes during the periods when it had encouraged Petitioner to operate the business as a going concern.

6. IRS files containing essential information that might have helped Petitioner present his case have been conveniently lost or inadvertently destroyed.

The District Court cited numerous cases for the propositions that liability imposed under 26 U.S.C. Sec. 6672 is separate and distinct from that imposed upon the employer, that the United States does not have to pursue the employer's liability for overdue taxes prior to assessing responsible person penalties and the government's lack of due diligence against the employer does not relieve the liability of the person responsible under Section 6672 for payment of the withholding taxes. (See "Memorandum and Order", App. 12-14.) These cases provided an easy, convenient and comfortable basis for the decision by the lower courts. However, none of those cases addressed the situation where the government actively participated in what amounted to a fraudulent conveyance of the employer's assets to a new corporate entity so it could escape tax liability. It is Respondent's knowing, active participation in a fraudulent scheme, not

mere lack of due diligence, that is the key and what distinguishes this case from the decisions relied upon by the District Court and Court of Appeals.

Although a successor corporation is not generally liable for the debts of its transferor, an exception exists when the successor is merely a continuation of its predecessor. (See, e.g., *Gloss* v. *Pfeffer*, 849 F.2d 1261 [10th Cir. 1988]; *Schmid* v. *Roehm GmbH*, 544 F. Supp. 272 [D. Kan. 1982]; *V.C. Video, Inc.* v. *National Video, Inc.*, 755 F. Supp. 962 [D. Kan. 1990]). New Sequal, the "successor corporation", had the same employees, the same equipment, the same suppliers and the same customers as the old company. The sole purpose for forming New Sequal was to try to avoid the old corporation's liabilities, chiefly the unpaid withholding taxes. Respondent admitted in its brief to the Court of Appeals that it was fully aware of all of this at the time it transpired.

Respondent's active participation in the final step in the scheme was the culmination of a pattern of misconduct by the government. The IRS originally entered into an agreement with Petitioner that he should keep the corporation running so that the business could be sold as a going concern and otherwise uncollectible withholding taxes for 1981 and earlier years (for which Petitioner was not personally responsible) could be paid from the corporate assets. (*Cf. Tozier* v. *United States*, 65-2 T.C. [CCH] Para. 9621, 16 A.F.T.R. 2d 5626 [W.D. Wash. 1965]; *McCarty* v. *United States*, 437 F.2d 961 [Ct. Cl. 1971]). There was sufficient, competent and uncontroverted evidence that the IRS consented to other creditors being preferred to the IRS to allow the company to stay in business pending a sale. This was clearly governmental

misconduct, rationalized only by the fact that both Petitioner and the IRS were counting on the sale of the corporation to pay all of the taxes, including those not collectible from Petitioner.

The corporation was finally sold. Under the agreement with Petitioner, that was supposed to be the payday for the IRS to collect the taxes in full. Instead, the IRS made an agreement with the new owner to accept $10.00 to $50.00 a week towards the unpaid taxes. The new owner decided to reincorporate Sequal, Inc. as "New Sequal" to avoid the tax liability. The IRS agent, fully aware of the facts, assisted him in doing so by establishing new corporate tax accounts and advising the new corporation to quit paying on the delinquent taxes.

26 U.S.C. Sec. 6672 is not a "strict liability" statute. It requires judicial review of the facts and circumstances of each case to determine whether the failure to pay was "willful". (*Mazo* v. *United States*, 591 F.2d 1151 [5th Cir. 1979]; *Schwinger* v. *United States*, 652 F. Supp. 464 [E.D.N.Y. 1987]). This review is important because it is the first opportunity that the taxpayer has to have his case heard by an impartial tribunal and not by the assessor and tax collector. Petitioner recognizes that there are numerous decisions which establish the general rule that a responsible person who knows withholding taxes are not being paid and allows other creditors to be paid before the IRS is acting "willfully". (See, e.g., *Burden* v. *United States*, 486 F.2d 302 [10th Cir. 1973], *cert. denied*, 416 U.S. 904 [1974]). However, the existence of facts which show active misconduct by the IRS has been held to bar the government from imposing Section 6672 penalties. (*Tozier* v. *United States*, 65-2 T.C. [CCH] Para. 9621, 16

A.F.T.R. 2d 5626 [W.D. Wash. 1965]; *McCarty* v. *United States*, 437 F.2d 961 [Ct. Cl. 1971]).

Both the District Court and Court of Appeals declined to apply either *Tozier* or *McCarty, id.* on the basis that they had unique facts which had no application to Petitioner's case. While Petitioner respectfully disagrees that those cases are so factually dissimilar to make them inapplicable, he submits that the true importance of *Tozier* and *McCarty* to his case lies not in their facts or application of law but in their *recognition* that circumstances such as bad faith and misconduct by the IRS can obviate against apparent willfulness. If Respondent and the lower courts are correct that *Tozier* and *McCarty* are absolutely unique and have no precedential viability, then Petitioner submits that no taxpayer would ever have any recourse in the courts, no matter how egregious the government's misconduct and the purpose behind judicial review of Section 6672 penalties is meaningless.

CONCLUSION

For the above and foregoing reasons, a Writ of Certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit along with the judgment and opinion of the United States District Court for the District of Kansas.

Respectfully submitted,

WILLIAM O. ISENHOUR, JR.
(Counsel of Record)
and
JOHN M. COX of
SODEN & ISENHOUR, P.A.
6005 Martway, Suite 108
Mission, Kansas 66202-3376
(913) 384-4800
Counsel for Petitioner

APPENDIX A

(Filed December 13, 1991)

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

K.E. NORTH, Plaintiff-Counter-Defendant-Appellant,	)	No. 91-3098
v.	)	(D.C. No. 88-4261-R)
UNITED STATES OF AMERICA, Defendant-Counter-Claimant-Appellee.	)	(D. Kan.)

ORDER AND JUDGMENT*

Before LOGAN, MOORE, and BALDOCK, Circuit Judges.

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. *See* Fed. R. App. P. 34(a); 10th Cir. R. 34.1.9. The case is therefore ordered submitted without oral argument.

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* This order and judgment has no precedential value and shall not be cited, or used by any court within the Tenth Circuit, except for purposes of establishing the doctrines of the law of the case, res judicata, or collateral estoppel. 10th Cir. R. 36.3.

Plaintiff appeals from an adverse judgment entered by the district court in this action arising out of the government's assessment of a one-hundred percent penalty against Plaintiff for willful failure to pay over employee withholding taxes pursuant to 26 U.S.C. § 6672. The district court granted the government's Motion for Summary Judgment as to Plaintiff's liability under the statute and reserved determination of the amount of the penalty for trial. To expedite review, the parties resolved the latter issue by stipulation. Judgment was entered in favor of the government in the sum of $106,719.78 plus interest, and Plaintiff appealed.

We review summary judgment determinations de novo. *Applied Genetics Int'l, Inc. v. First Affiliated Sec., Inc.*, 912 F.2d 1238, 1241 (10th Cir. 1990). "We apply the same legal standard used by the district court under Fed. R. Civ. P. 56(c) and examine the record to determine if any genuine issue of material fact was in dispute; if not, we determine if the substantive law was correctly applied." *Id.* While we view the record in the light most favorable to the party opposing summary judgment, "the nonmoving party may not rest on its pleadings but must set forth specific facts showing that there is a genuine issue for trial as to those dispositive matters for which it carries the burden of proof." *Id.*

The facts pertinent to the disposition of this case have been set out in detail by the district court and the parties. Therefore, we shall only refer to particular matters as needed in the course of our analysis.

The § 6672 penalty may be imposed upon (1) any responsible person (2) who has willfully failed to collect,

account for, or pay over federal employment taxes. *Burden v. United States*, 486 F.2d 302, 304 (10th Cir. 1973), *cert. denied*, 416 U.S. 904 (1974); *Williams v. United States*, 931 F.2d 805, 809-10 (11th Cir.), *reh'g granted and op. supp. on other grounds*, 939 F.2d 915 (1991). Plaintiff concedes his status as a responsible person under the statute. Thus, only the element of willfulness is in dispute, a matter upon which Plaintiff bears the burden of proof. *Williams*, 931 F.2d at 810; *Calderone v. United States*, 799 F.2d 254, 258-59 (6th Cir. 1986).

Plaintiff also admits that he knew creditors were being paid after he had become aware of the failure to pay over withholding taxes to the government. Ordinarily, evidence of such conduct would establish willfulness and warrant entry of summary judgment against a responsible person under § 6672. *See Mazo v. United States*, 591 F.2d 1151, 1157 (5th Cir.), *cert. denied*, 444 U.S. 842 (1979); *Carter v. United States*, 717 F. Supp. 188, 193-94 (S.D.N.Y. 1989). *See generally Burden*, 486 F.2d at 304 (" '[w]illfully' as used in [§ 6672] . . . means a voluntary, conscious and intentional decision to prefer other creditors over the Government . . . [and] does not require bad motive as in a criminal case"). Plaintiff seeks to avoid this consequence by arguing that this case presents unusual circumstances justifying recognition of at least one of several potential affirmative defenses to § 6672 liability. We agree with the district court that, to whatever extent the asserted defenses are otherwise viable, the evidence relied upon by Plaintiff is insufficient to demonstrate a triable issue thereunder.

Without committing this court to the exceptional holdings in *McCarty v. United States*, 437 F.2d 961 (Ct. Cl.

1971), and *Tozier v. United States*, 65-2 U.S.T.C. (CCH) ¶ 9621 (W.D. Wash. 1965), we note that subsequent decisions have generally limited these cases to their quite unusual facts. Thus, relief from § 6672 liability might be awarded under *McCarty* only if the government actively prevented the responsible person from paying over withheld taxes, *see Calderone*, 799 F.2d at 257; *Cooper v. United States*, 539 F. Supp. 117, 122 (E.D. Va. 1982), *aff'd*, 705 F.2d 442 (4th Cir. 1983), and under *Tozier* only if the government actually entered into an agreement with the responsible person to look solely to company assets for delinquent taxes (in return for the responsible party's commitment to continuing operation of the business), *see Peterson v. United States*, 728 F. Supp. 624, 625 (D. Idaho 1989); *United States v. De Beradinis*, 395 F. Supp. 944, 953 (D. Conn. 1975), *aff'd*, 538 F.2d 315 (2d Cir. 1976). The evidence cited by Plaintiff implicates neither of these scenarios, which thus remain merely remote speculative possibilities insufficient to raise a triable issue.[1] Plaintiff's

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[1] Plaintiff himself did not even testify that the government actually prevented his compliance with § 6672 or expressly agreed or promised to hold him harmless for any noncompliance. At most, Plaintiff's testimony indicates only that he may have unilaterally drawn the latter, self-serving conclusion at the time. Indeed, even this characterization of the evidence may be overgenerous, as Plaintiff admitted in his deposition that the government "made it very clear to me that the taxes had to be paid, there was absolute clarity on that issue." Appellant's App. at 91. In any event, application of an estoppel principle against the government to thwart its enforcement of § 6672 on the scant showing made by Plaintiff would be clearly inappropriate. *See generally Trapper Mining Inc. v. Lujan*, 923 F.2d 774, 781 (10th Cir.), *cert. denied*, 112 S. Ct. 81 (1991); *Penny*

(Continued on following page)

related objection that the government should have pursued collection efforts against his employer more diligently before looking to Plaintiff for satisfaction under § 6672 is undercut by a host of authorities noted by the district court.

Plaintiff has also referred us to a line of Fifth Circuit cases recognizing a "reasonable cause" exception to willfulness under § 6672. *See, e.g., Newsome v. United States,* 431 F.2d 742, 746-47 and n.11 (5th Cir. 1970). However, this is clearly a minority view, *see, e.g., Barnett,* 594 F.2d at 221-22; *Harrington v. United States,* 504 F.2d 1306, 1316 (1st Cir. 1974); *Monday v. United States,* 421 F.2d 1210, 1216 (7th Cir.), *cert. denied,* 400 U.S. 821 (1970); *Parr v. United States,* 694 F. Supp. 146, 147 (D. Md. 1988); *IRS v. Blais,* 612 F. Supp. 700, 711 (D. Mass. 1985); *Cooper,* 539 F. Supp. at 121 and n.6, which, moreover, appears to clash with this circuit's insistence that (bad) motive is not a pertinent inquiry under § 6672. *See Burden,* 486 F.2d at 304; *see also Scott v. United States,* 702 F. Supp. 261, 265 (D. Colo. 1988) (*Burden* implicitly rejects reasonable cause exception); *Gray v. United States,* 586 F. Supp. 1127, 1131 (D. Kan. 1984) (same). Indeed, even the Fifth Circuit, which has noted the difficulty of establishing reasonable cause for

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v. Giuffrida, 897 F.2d 1543, 1546 (10th Cir. 1990). Even if the government knew of the precarious financial standing of Plaintiff's company and stood by as Plaintiff incurred a greater and greater liability under § 6672 trying to keep the company operating, the government's (in)action would not negate the willfulness of Plaintiff's conduct or estop the government from imposing the statutory penalty. *Barnett v. United States,* 594 F.2d 219, 221-22 (9th Cir. 1979).

noncompliance with § 6672, *see Bowen v. United States*, 836 F.2d 965, 968 (5th Cir. 1988) ("no taxpayer has yet carried that pail up the hill"), would probably not apply the principle under the present circumstances. *See Newsome*, 431 F.2d at 748 n.12 (reasonable cause would not include taxpayer's assumption that government would look elsewhere to satisfy taxes or taxpayer's expectation that financial condition of business would improve). The district court did not err in failing to recognize a reasonable cause exception excusing Plaintiff's noncompliance with § 6672.

Finally, Plaintiff argues that the government's enforcement of § 6672 against him violated his Fourteenth Amendment rights. We agree with the district court and the government that Plaintiff has made no showing of a cognizable constitutional claim. *See generally Austin v. United States*, 611 F.2d 117, 119-20 (5th Cir. 1980) (rejecting equal protection claim based on selective enforcement of tax provision); *Kalb v. United States*, 505 F.2d 506, 510 (2d Cir. 1974) (rejecting due process challenge to § 6672), *cert. denied*, 421 U.S. 979 (1975).

The judgment of the United States District Court for the District of Kansas is AFFIRMED. Plaintiff's request for oral argument is DENIED.

Entered for the Court

John P. Moore
Circuit Judge

APPENDIX B

(Filed July 11, 1990)

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF KANSAS

K. E. NORTH, Plaintiff,	)	**Case No. 88-4261-R**
vs.	)	
UNITED STATES OF AMERICA, Defendant.	)	

MEMORANDUM AND ORDER

Plaintiff Kenneth North brought this action against the United States to obtain a refund of $152.76 paid in partial satisfaction of a "100% penalty" assessed against him as a responsible officer of Sequal, Inc., which had failed to remit to the United States the federal employment taxes withheld from the wages of employees for various taxable quarters of 1982, 1983 and 1984. The United States has filed a counterclaim against North seeking judgment for $117,715.49 plus statutory additions from the date of assessment. This matter is presently before the court upon the United States' motion for summary judgment.

In considering the defendant's motion for summary judgment, the court must examine all the evidence in the light most favorable to the plaintiff. *Barber v. General Electric Co.*, 648 F.2d 1272, 1276 n. 1 (10th Cir. 1981). Summary judgment is proper only when "there is no genuine issue as to any material fact and . . . the moving

party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). Under this rule, the initial burden is on the moving party to show the court "that there is an absence of evidence to support the nonmoving party's case." *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). The moving party's burden may be met when that party identifies those portions of the record which demonstrate the absence of a genuine issue of material fact. *Id.* at 323.

Once the moving party has met these requirements, the burden shifts to the party resisting the motion. The non-moving party must "make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Id.* at 322. The party resisting the motion "may not rest upon the mere allegations or denials of his pleadings . . . " to avoid summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The mere existence of a scintilla of evidence will not avoid summary judgment; there must be sufficient evidence on which a jury could reasonably find for the nonmoving party. *Id.* at 251 (quoting *Improvement Co. v. Munson*, 81 U.S. (14 Wall.) 442, 448 (1872)). The facts in this case are generally not in dispute. The court shall provide some background based on the undisputed facts and then consider the facts which remain in dispute as we examine the issues raised by the parties in the instant motion.

In February 1981, North assumed control of Sequal, Inc., a Kansas corporation, as president, treasurer and chief executive officer. He retained these positions until December 31, 1984. During this period, North was responsible for the day-to-day financial affairs of the

corporation. North was the person responsible for collecting, accounting for and paying over the employment taxes for the corporation to the United States. From April 1982 through December 1984, Sequal, Inc. failed to pay federal withholding and social security taxes to the United States. On December 31, 1984, the stock of Sequal, Inc. was sold to James C. Williams. On March 2, 1987, the United States made an assessment against North in the amount of $117,868.25 pursuant to 26 U.S.C. § 6672. North paid $152.76 on the assessment. He then filed this action for refund of this amount and abatement of the remainder of the assessment.

An employer is required to deduct and withhold income and social security taxes from the wages paid to its employees. 26 U.S.C. §§ 3102(a), 3402(a). The amount of taxes so collected or withheld are to be held in a special fund or trust for the United States. 26 U.S.C. § 7501. These "trust fund taxes" are for the exclusive use of the United States and are not to be used to pay the employer's business expenses or for any other purpose. 26 U.S.C. §§ 3102(b), 3403, 7501(a). In order to effectuate these provisions, Congress enacted a separate penalty assessable against the corporate employees who, though responsible for withholding and paying over the employment taxes to the United States, fail to ensure that the employer complies with these laws. 26 U.S.C. § 6672. Section 6672(a) provides as follows:

> Any person required to collect, truthfully count [sic] for, and pay over any tax imposed by this title who willfully fails to collect such tax, or truthfully account for and pay over such tax, or willfully attempts in any manner to evade or

> defeat any such tax or the payment thereof, shall, in addition to other penalties provided by law, be liable to a penalty equal to the total amount of the tax evaded, or not collected, or not accounted for and paid over. No penalty shall be imposed under section 6653 for any offense to which this section is applicable.

Though termed a "penalty," the liability imposed by § 6672 is civil in nature. *Emshwiller v. United States*, 565 F.2d 1042, 1045 (8th Cir. 1977). The primary purpose of the section is the protection of government revenue. *United States v. Huckabee Auto Co.*, 783 F.2d 1546, 1548 (11th Cir. 1986).

Two elements must be shown to establish liability against an individual under § 6672. First, he must be a "responsible person," required to collect and pay over the taxes due. Second, he must have "willfully" failed to collect or pay over the taxes. *Burden v. United States*, 486 F.2d 302 (10th Cir. 1973), *cert. denied*, 416 U.S. 904 (1974).

North raises several defenses in response to the United States' assessment of the "100% penalty" of 26 U.S.C. § 6672. He initially asserts that his failure to pay the employment taxes was not "willful" within the meaning of § 6672. This argument is based on the contention that the United States "acquiesced in" or "agreed to" his failure to pay the taxes. He next argues that the United States was barred from collecting from him based on theories of estoppel, waiver, abandonment and fraud. North's position concerning these defenses is that the United States should have collected the taxes from Sequal, Inc. before requiring him to pay as an officer of the corporation. He relies upon *Tozier v. United States*,

65-2 U.S.T.C. ¶ 9621 (W.D.Wash. 1965) and *McCarty v. United States*, 437 F.2d 961 (Ct.Cl. 1971) for support of these contentions. Finally, North suggests that any attempt by the United States to collect this penalty from him would violate his equal protection rights. This contention is twofold. First, North asserts that the United States' actions in this case violate his constitutional rights because the United States did not assess a penalty against other responsible persons. Second, he argues that his equal protection rights are being violated because the United States did not actively seek to collect the taxes from Sequal, Inc. prior to assessing the "100% penalty" of § 6672 against him.

North does not contest that he was a "responsible person" for the time period at issue in this case, April 1982 through December 1984. Accordingly, the only issue as to the applicability of § 6672 is whether North willfully failed to perform his duty to collect, account for or pay over the taxes. North's arguments concerning willfulness, estoppel, abandonment, waiver and fraud are related. They all arise from his contention that the United States should have pursued Sequal, Inc. and collected the taxes from the corporation. He argues that the United States had the opportunity to recover the taxes from Sequal, Inc. but elected to do nothing and, by its acts and conduct, allowed the assets of the corporation to dissipate. His position is that the United States' conduct constitutes waiver, or abandonment, or estoppel, or fraud.

"Willfully," as used in § 6672, means a "voluntary, conscious and intentional decision to prefer other creditors over the government. It does not require bad motive as in a criminal case." *Burden v. United States*, 486 F.2d at

304. North has admitted that he knew that the taxes in question were not being paid to the United States from late November or early December 1981 to the end of 1984. He has further admitted that he paid creditors other than the United States while these tax liabilities existed. These undisputed facts demonstrate the requisite "willfulness" necessary for liability under § 6672. North's contentions that the United States "acquiesced in" and "agreed to" his failure to pay taxes is not supported by law or fact. The facts, even when viewed in the light most favorable to North, suggest only that the Internal Revenue Service encouraged North in his efforts to sell the corporation when North realized that a sale would be the only way that the tax liabilities could be paid. This evidence hardly amounts to an agreement or any wrongful conduct by the Internal Revenue Service. The IRS sought only to receive payment for the tax liabilities and was not adverse to any method selected by the plaintiff or Sequal, Inc. North also points out that he offered to terminate the operation of Sequal, Inc. at any time the IRS decided it should be closed. The evidence does not disclose that the IRS ever agreed to North's offer and, of course, the IRS was not required to enter into such an agreement.

North's arguments of waiver, estoppel, abandonment and fraud are meritless. These arguments also lack support in the law and the facts. The liability imposed under § 6672 is separate and distinct from that imposed upon the employer. *USLIFE Title Insurance Co. of Dallas v. Harrison*, 784 F.2d 1238, 1243 (5th Cir. 1986); *Mazo v. United States*, 591 F.2d 1151, 1155 (5th Cir. 1979), *cert. denied*, 444 U.S. 842 (1979); *Hornsby v. Internal Revenue Service*, 588 F.2d 952, 954 (5th Cir. 1979); *Emshwiller v. United States*,

565 F.2d at 1047; *Monday v. United States*, 421 F.2d 1210, 1218 (7th Cir. 1970), *cert. denied*, 400 U.S. 821 (1970); *Spivak v. United States*, 370 F.2d 612, 615 (2d Cir. 1967), *cert. denied*, 387 U.S. 908 (1968); *Datlof v. United States*, 370 F.2d 655, 656 (3d Cir. 1966), *cert. denied*, 387 U.S. 906 (1967); *Peterson v. United States*, 728 F.Supp. 624, 625 (D.Idaho 1989); *Reph v. United States*, 615 F.Supp. 1236, 1243 (N.D.Ohio 1985); *Young v. United States*, 609 F.Supp. 512, 517 (N.D.Tex. 1985). The United States does not have to pursue the employer's liability for overdue trust fund taxes prior to assessing responsible persons with tax penalties to cover nonpayment of those taxes. *Calderone v. United States*, 799 F.2d 254, 257 (6th Cir. 1986); *United States v. Huckabee Auto Co.*, 783 F.2d at 1548; *Howard v. United States*, 711 F.2d 729, 736 (5th Cir. 1983); *Hornsby v. United States*, 588 F.2d at 954; *Moore v. United States*, 465 F.2d 514, 517 (5th Cir. 1972); *Monday v. United States*, 421 F.2d at 1218; *Spivak v. United States*, 370 F.2d at 615; *Datlof v. United States*, 370 F.2d at 656; *United States v. Davel*, 669 F.Supp. 924, 927 (E.D.Wis. 1987); *Turchon v. United States*, 77 B.R. 398, 401 (E.D.N.Y. 1987), *aff'd without pub. opinion*, 841 F.2d 1116 (2d Cir. 1988); *Mulee v. United States*, 648 F.Supp. 1181, 1187 (N.D.Ill. 1986); *Young v. United States*, 609 F.Supp. at 517; *Hutchinson v. United States*, 559 F.Supp. 890, 894 (N.D.Ohio 1982); *Cooper v. United States*, 539 F.Supp. 117, 122 (E.D.Va. 1982), *aff'd without pub. opinion*, 705 F.2d 442 (4th Cir. 1983); *Van Westerhuyzen v. United States Treasury Department*, 407 F.Supp. 334, 335 (D.Minn. 1975). The United States' lack of due diligence against the employer does not relieve the liability of the person responsible for payment of the withholding taxes. *United States v. Huckabee Auto Co.*, 783 F.2d at 1549; *Howard v.*

United States, 711 F.2d at 736; *Peterson v. United States*, 728 F.Supp at 625; *Reph, v. United States*, 615 F.Supp. at 1243.

North's reliance upon *Tozier* and *McCarty* is misplaced. We are not convinced that the Tenth Circuit would apply the teachings of either *Tozier* or *McCarty*. The courts in *Tozier* and *McCarty* failed to recognize the aforementioned principles of law which are now generally accepted without question. Moreover, these cases have unique facts which have no application to the circumstances before the court. North has failed to come forward with sufficient evidence of an agreement such as existed in *Tozier*. He has not demonstrated any action by the government that would negate the willful requirement of § 6672. In addition, unlike *McCarty*, he has made no showing that the government prevented him from discharging his obligation to pay over the withheld taxes.

The court shall next turn to North's equal protection arguments. These arguments must meet the same fate as the previous contentions. The failure of the government to assess another responsible person or proceed against the corporation does not release plaintiff from liability or establish an equal protection claim. See *Internal Revenue Service v. Blais*, 612 F.Supp. 700, 704 (D.Mass. 1985); *Cooper v. United States*, 539 F.Supp. 117, 122 (E.D.Va. 1982), *aff'd*, 705 F.2d 442 (4th Cir. 1983). North has made no showing that the assertion of the penalty against him was invidious and based upon impermissible, discriminatory considerations such as race or religion. *United States v. Amon*, 669 F.2d 1351 (10th Cir. 1981); *United States v. Epp*, 587 F.Supp. 383 (D.Kan. 1984).

Finally, we need to consider the sole remaining issue. North contends that summary judgment cannot be granted to the United States because the amount owed by him remains in dispute. We must agree. The United States contends that North owes a "100% penalty" of $117,715.49. This amount is based on the following quarterly assessments minus the amount paid by North prior to the initiation of this action ($152.76):

Quarter Ended	Unpaid Trust Fund Taxes
06/30/82	11,213.33
09/30/82	20,626.26
12/31/82	25,967.86
03/31/83	13,284.09
06/30/83	16,257.70
09/30/83	1,993.59
12/31/83	16,534.69
06/30/84	6,932.94
12/31/84	5,057.79
TOTAL	$117,868.25

As support for these amounts, the United States relies upon a "Certificate of Assessments and Payments" which is Exhibit A to its motion for summary judgment. This document, which was prepared by the Manager of the Certification Unit at the Austin IRS Service Center, contains only the final figure of $117,868.25 and does not contain a breakdown of the assessments by quarters.

North, in response to the United States' motion for summary judgment, points to a document sent to him by the IRS prior to the initiation of this action entitled "Proposed Assessment of 100 Percent Penalty," which indicates that the penalty for the quarter ended 12/31/83 is

$5,385.82. This amount is over ten thousand dollars less than the amount contained in the United States' motion for summary judgment for this quarter.

This factual dispute cannot be determined based on the evidence before the court. The conflicting documents make this issue an inappropriate one for summary judgment. The court questioned counsel for the United States at oral argument about the discrepancy, but she was unable to provide a satisfactory answer. Counsel for the United States did raise a waiver argument, but she did not provide sufficient support for this contention. In sum, we find that the United States' motion for summary judgment must be denied on this point. We do find, however, that the United States is entitled to summary judgment on the other issues in this case. The sole remaining issue is the amount owed by North to the United States pursuant to 26 U.S.C. § 6672.

IT IS THEREFORE ORDERED that defendant's motion for summary judgment be hereby granted in part and denied in part. The only remaining issue left for trial is the amount of the penalty owed by the plaintiff to the United States.

IT IS FURTHER ORDERED that the defendant's motion for attorney's fees pursuant to Fed.R.Civ.P. 11 be hereby denied.

IT IS SO ORDERED.

Dated this 11th day of July, 1990 at Topeka, Kansas.

/s/ Richard D. Rogers
United States District Judge

APPENDIX C

(Filed August 14, 1990)

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF KANSAS

K. E. NORTH, Plaintiff, vs. UNITED STATES OF AMERICA, Defendant.	)	**Case No. 88-4261-R**

ORDER

This matter is presently before the court upon plaintiff's motion for reconsideration. Plaintiff requests the court to reconsider its order of July 11, 1990. Having carefully reviewed the arguments of the parties, the court finds that plaintiff's motion must be denied. The arguments raised by the plaintiff in the instant motion are without merit.

IT IS THEREFORE ORDERED that plaintiff's motion for reconsideration be hereby denied.

IT IS SO ORDERED.

Dated this 14th day of August, 1990 at Topeka, Kansas.

/s/ Richard D. Rogers
United States District Judge

APPENDIX D

(Filed January 17, 1991)

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF KANSAS

K. E. NORTH, Plaintiff	)	**Case No. 88-4261-R**
v.	)	
UNITED STATES OF AMERICA, Defendant.	)	

JUDGMENT

THIS ACTION came before the Court upon the United States Motion for Summary Judgment. An Order having been entered on July 11, 1990, granting the Motion in part, and the parties having resolved the remaining issue by Stipulation,

IT IS HEREBY ORDERED AND ADJUDGED that the plaintiff, K. E. North, take nothing on his complaint, that the complaint be dismissed on the merits and that the defendant, United States of America, recover of the plaintiff, K. E. North, its costs of this action.

IT IS FURTHER ORDERED AND ADJUDGED that judgment is hereby entered in favor of the defendant, United States of America, on its counterclaim against the plaintiff, K. E. North, in the sum of $106,719.78 plus statutory interest pursuant to 26 U.S.C. Sec. 6621, and accruing according to law after March 2, 1987, the date on which the 100% penalty in issue was assessed, plus costs.

DONE AND ORDERED in chambers this 16th day of January, 1991.

/s/ Richard D. Rogers
RICHARD D. ROGERS
United States District Judge

APPROVED:

SODEN & ISENHOUR, P.A.

BY: /s/ William O. Isenhour, Jr.
William O. Isenhour, Jr. KS #06842
6005 Martway, Suite 108
Mission, Kansas 66202-3376
(913) 384-4800
Attorneys for Plaintiff

LEE THOMPSON
United States Attorney

BY: /s/ Kimberly S. Forseth
Kimberly S. Forseth
Trial Attorney
Office of Special Litigation
Tax Division
U.S. Department of Justice
P. O. Box 7238
Ben Franklin Station
Washington, DC 20044